No. 76-770

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM CAHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1976. The petition for a writ of certiorari was filed on December 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that a superseding indictment, returned after the jury had been unable to reach a verdict on the original indictment, was not motivated by vindictiveness on the part of the government.

2. Whether the false statement counts of the indictment against petitioner charged an offense under 18 U.S.C. 1001.

3. Whether 42 U.S.C. 3792 pre-empts 18 U.S.C. 1001 in connection with false statements involving funds of the Law Enforcement Assistance Administration.

4. Whether petitioner's use of the mails to submit claims that knowingly failed to disclose facts that would have resulted in their rejection constituted mail fraud.

5. Whether the district court abused its discretion in admitting evidence of prior similar acts.[1]

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on three counts of making false statements in a matter within the jurisdiction of the Law Enforcement Assistance Administration (Counts One to Three) and seven counts of willfully and knowingly failing to disclose material facts in a matter within the jurisdiction of that federal agency (Counts Four to Ten), in violation of 18 U.S.C. 1001 and 2, and on 35 counts of mail fraud (Counts Eleven to Forty-Four and Count Forty-Six), in violation of 18 U.S.C. 1341.[2] He was sentenced to concurrent terms of imprisonment for one year and one day on Counts One to Forty-Four. The

[1]Petitioner's list of "Questions Presented" also contains a question that is not discussed in the petition, *i.e.*, whether 18 U.S.C. 1001 requires proof beyond a reasonable doubt that the alleged false statement was material. This issue was not raised in the court of appeals. In any event, as we show below, the evidence of the materiality of petitioner's false statements was overwhelming.

[2]Count Forty-Five was dismissed before trial on the government's motion (A. 37). "A." refers to the appendix filed in the court of appeals.

imposition of sentence on Count Forty-Six was suspended, and petitioner was placed on two years' unsupervised probation. A concurrent fine of $2500 was imposed on all counts (A. 1979). The court of appeals affirmed (Pet. App. A).

1. Petitioner was the District Attorney of Nassau County, New York. The evidence showed[3] that, over a five-year period, he attempted to generate cash for his own use by seeking reimbursement for the same travel expenses both from Nassau County and from a number of law enforcement organizations in which he was active. On some occasions petitioner certified falsely to the particular organization, or caused a member of his staff to certify falsely, that he was not receiving or could not receive compensation for his expenses from any other source; on other occasions petitioner failed to disclose the availability of funds from Nassau County, although each of the organizations from which he sought reimbursement either had written or unwritten rules that would have prohibited reimbursement if they had known of that fact. Evidence introduced on the issue of intent also established that petitioner often billed both Nassau County and an organization for hotel or other expenses that had been provided to him free of charge. Moreover, some three years after he had obtained $1,385 from the county for a trip that had actually cost him $395, and after an investigation of his fraudulent activities had commenced, petitioner approached a travel agent and asked him to corroborate a false story that would help to extricate petitioner from the investigation (A. 507-513).

[3]Petitioner's statement of "Facts Developed at Trial No. 2" (Pet. 5-11) is taken almost entirely from his direct testimony at trial. Petitioner's exclusive reliance upon his own testimony (which the jury rejected), his failure to set forth a complete statement of the case, and the essentially factual nature of many of his claims necessitate a relatively detailed summary of the evidence in this brief.

Petitioner's defense was based on a meeting he claimed to have had with an anonymous person whom he called "Sam Houston." This person allegedly offered to become a paid informant for Nassau County on the condition that extraordinary precautions would be taken to conceal his identity (A. 752-757). Although it was possible for petitioner lawfully to obtain money to pay an informant without divulging his identity simply by using a code number, "Houston" allegedly objected even to this procedure (A. 754).[4] Moreover, according to petitioner, "Houston" insisted on meeting in various locations around the country to impart his information.

Despite the fact that the tips petitioner claimed to have received from "Houston" at this initial meeting were merely a rehash of stories that had already appeared in Nassau County newspapers (S.A. 242-244; A. 1232),[5] clippings of which were collected by the District Attorney's Office, petitioner allegedly agreed to the informant's conditions. According to petitioner, in order to generate money to pay "Houston" he decided to arrange his extensive travel on behalf of various organizations to coincide with his business trips for Nassau County. The county and the organization on whose behalf he had travelled then would each be billed for reimbursement, and the latter funds would allegedly be used to pay "Houston" in cash. However, the Comptroller of Nassau County could recall no conversation in which the specifics of this plan had been discussed with him (A.

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[4]Petitioner nonetheless admitted that he used a code number to identify "Houston" in claims he made to Nassau County for reimbursement on trips during which he allegedly met the informant (A. 1298).

[5]"S.A." refers to the supplemental appendix filed in the court of appeals.

615-617), nor had any of the organizations been advised of the use to which their monies were purportedly being devoted.

Approximately $19,500 was allegedly paid to "Houston" from 1971 to 1974, even though all of the information that petitioner claimed "Houston" had provided had previously appeared in the newspapers or was otherwise already known in law enforcement circles (A. 1602-1620, 1192-1193, 1227-1250, 1320-1325). Indeed, no new cases were ever opened as a result of tips allegedly provided by the informant (A. 1327), nor were any investigations commenced by the Nassau County Police Department (A. 687).

2. Petitioner's first trial ended in a mistrial when the jury was unable to reach a verdict. The original indictment (excluding two counts of perjury that were severed) had contained eight counts arising out of the fraudulent double billing scheme described above: seven counts of mail fraud (18 U.S.C. 1341) and one count of filing a false statement in a matter within the jurisdiction of the Law Enforcement Assistance Administration ("L.E.A.A.") (18 U.S.C. 1001) (A. 11a-21a). These eight claims for dual reimbursement had been singled out because, in his grand jury testimony, petitioner had originally led the United States Attorney to believe that the proceeds of these claims had not been used to pay "Houston." Thus, the government assumed that a trial on these charges would not involve the issue of the alleged existence of the informant or a defense based on the allegedly beneficent use of the proceeds of the double billings (A. 186a-187a). At the first trial, however, petitioner testified that he had been mistaken and that he had in fact used the proceeds of the eight claims charged in the indictment to pay "Houston."

When it became apparent that there would be a retrial of petitioner's case, at which the "Houston" defense

would again be raised, the government determined to seek a new indictment that included all of the instances of double billing. Accordingly, the district court was expressly advised of the reason for this decision prior to the second trial (A. 186a-187a), and a superseding indictment was obtained. It charged 44 separate instances of double billing, including one (Count Forty-Six) that involved petitioner's seeking compensation for a hotel room that had been provided without charge and billing twice for transportation on the same trip.

3. The evidence against petitioner at the retrial was substantial.

a. Counts One and Two involved the filing of false statements within the jurisdiction of L.E.A.A., a federal agency that provided funds to the National College of District Attorneys (N.C.D.A.) for the specific program for which petitioner claimed reimbursement (A. 452). Petitioner was aware of the source of the money that was used to pay the claims he submitted (A. 453-457, 1167). The claim involved in Count One amounted to $142.73 for air fare for a trip to Chicago, Illinois. Since petitioner was also conducting business for Nassau County on this occasion (A. 801-802), the county paid the expenses for the trip. Nevertheless, petitioner sought payment from N.C.D.A. and certified "that other funds are not available and I am not receiving reimbursement from any other source" (G.X. 1A, S.A. 20).

The claim involved in Count Two arose out of the same trip. It was signed by Joseph E. Spinnato, the Chief of petitioner's Rackets Bureau. Although petitioner obtained the money to pay Spinnato's air fare from Nassau County, he did not advise Spinnato of this fact and instead had him execute a claim containing a certification identical to that signed by petitioner in Count One (A. 222-223; G.X. 2A, S.A. 23). When Spinnato received payment from N.C.D.A., he endorsed the check to petitioner, who cashed it (A. 220).

Count Three involved petitioner's filing of a similar false certification with the National Center for Prosecution Management. That organization is funded entirely by L.E.A.A. (A. 132-133), whose guidelines (as the claim forms submitted by petitioner indicated) govern the payment of its claims. Although petitioner received $246.80 from Nassau County for travel to a Board of Directors meeting in Mexico (G.X. 3, A. 2005-2006), he nevertheless certified that he was not receiving dual compensation for the trip (G.X. 3A, S.A. 26).

b. Counts Four to Ten involved seven claims for reimbursement to four different law enforcement agencies that were funded by L.E.A.A. and that, with petitioner's knowledge, paid the claims with federal monies. Indeed, two of the claims, which were paid with United States Treasury checks (S.A. 59-60, 62-63), were submitted on forms which expressly stated that "U.S. Government travel regulations" were applicable (S.A. 48, 51, 61). Although Nassau County again paid for each of these trips, petitioner failed to disclose that fact. None of these claims would have been paid if the truth had been known (A. 136-138, 260-261, 365, 459-460, 536-537).

c. The remaining counts charged petitioner with fraudulent use of the mails by obtaining reimbursement for travel expenses from organizations without disclosing that the trips had been paid for by Nassau County or that, in one instance, no expenses had been incurred (A. 35a-39a). Again, each of the defrauded organizations had rules that precluded payment in such circumstances (see, *e.g.*, A. 135-137).

ARGUMENT

1. Relying on *Blackledge* v. *Perry*, 417 U.S. 21, petitioner contends (Pet. 11-18) that the additional counts included in the superseding indictment were added to penalize him for exercising his right to a trial on the

original indictment, which ended in a mistrial when the jury was unable to reach a verdict. The court of appeals correctly rejected this claim, stating (Pet. App. 33):

> [T]his case is distinguishable from *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *North Carolina* v. *Pearce*, 395 U.S. 711 (1969); and *United States* v. *Jamison*, 505 F. 2d 407 (D.C. Cir. 1974), in several respects, primarily in that those cases involved the possibility of penalizing a defendant for his successful assertion of his rights. Impermissible retaliation is not present here. Furthermore, the government has explained to our satisfaction why it did not originally seek an indictment on all the counts, for which [petitioner] was indicted the second time. All else aside, [petitioner] did not raise this claim before trial as required by Fed. R. Crim. P. 12(b). See *Davis* v. *United States*, 411 U.S. 233 (1973).

a. As the court of appeals held, petitioner's failure to present his *Blackledge* argument prior to trial constituted a waiver of that claim. Fed. R. Crim. P. 12(b) and (f). Contrary to petitioner's contention (Pet. 17), the due process claim he is presently asserting is entirely different from the one that he raised prior to trial. Petitioner's pre-trial motion to dismiss the superseding indictment did not allege that he was being penalized for exercising his right to go to trial or for putting on a defense, nor did it rely on any of the cases cited in the petition. Indeed, petitioner expressly conceded at that time that he "does not argue that he cannot be retried on the superseded indictment nor that the government is limited to using the same evidence adduced at the first trial" (A. 136a).

Instead, petitioner's pre-trial motion "disputed * * * the government's ability to intentionally hold back alleged violations from one indictment in order to obtain disclosure of the [petitioner's] case and refine its own

prosecution in light of events at the first trial" (A. 136a). Thus, petitioner's complaint related to the government's intention to add new counts at the retrial in order to enhance its evidentiary presentation,[6] not to the charge that the additional counts in the superseding indictment had been motivated by "retaliation." Not until after the second trial did petitioner suggest that the government had violated due process by adding the new counts out of vindictiveness (A. 1925).

b. In any event, petitioner's claim was correctly rejected by the court of appeals. In *Blackledge* v. *Perry*, *supra*, the Court held that the Due Process Clause prohibits the government from increasing the charges against a defendant at a retrial occasioned by the defendant's successful assertion of his legal rights. The Court's decision was expressly designed to remove the threat of prosecutorial vindictiveness aimed at discouraging a defendant from attempting to obtain a new trial or other relief (417 U.S. at 28). This rationale is wholly inapplicable here.

First, unlike *Blackledge* (where the defendant had exercised his statutory right to a trial *de novo*) or the lower court cases on which petitioner relies (where the defendant either had successfully moved for a mistrial,[7] vacated his conviction on collateral attack,[8] refused to plead guilty,[9] or insisted upon being tried by a district judge

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[6]This claim was properly rejected by the district court. This Court has observed that "the Government is not limited at a new trial to the evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence." *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 243. See also *United States* v. *Ewell*, 383 U.S. 116, 124-125.

[7]*United States* v. *Jamison*, 505 F. 2d 407 (C.A. D.C.).

[8]*United States* v. *Johnson*, 537 F. 2d 1170 (C.A. 4).

[9]*Hayes* v. *Cowan*, C.A. 6, No. 76-1409, decided December 30, 1976.

rather than a magistrate[10]), a retrial was required here not because petitioner had determined to assert his legal rights but because petitioner's initial trial had ended in a hung jury. The court had entered a mistrial *sua sponte* out of necessity. Thus, a holding that the government's conduct in this case violated due process would effectively immunize petitioner for past crimes while failing to accomplish the sole purpose underlying the decision in *Blackledge*—the elimination of practices that might operate to discourage defendants from seeking legal remedies available to them.

More importantly, as the court of appeals held, "[i]mpermissible retaliation is not present here. * * * [T]he government has explained to our satisfaction why it did not originally seek an indictment on all the counts, for which [petitioner] was indicted the second time" (Pet. App. 33). As we have already noted, the government expressly informed the district court prior to the retrial that, in order to simplify the issues, it had drafted the original indictment so as to include only those counts to which, according to petitioner's grand jury testimony, his "Sam Houston" defense did not apply (A. 186a-187a). Contrary to this grand jury testimony, however, petitioner testified at the first trial that the funds involved in the seven counts of the original indictment had in fact been used to pay the mysterious informant. Thus, when it became obvious that a second trial would be held and that the "Sam Houston" defense would again be presented to the jury, the government concluded that the considerations that had led to its decision to exclude the other charges from the initial indictment were no longer valid. It therefore sought a superseding indictment containing all of the offenses with which petitioner would have been charged had the government not been misled about the theory of his defense.

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[10] *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (C.A. 9).

On this record, the government clearly met its "heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive." *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367, 1369 (C.A. 9) (footnote omitted). This essentially factual determination, reached by two lower courts after an independent assessment of the evidence, does not warrant further review.

c. Even assuming that petitioner's contentions are correct, he nonetheless would not be entitled to a reversal of his entire conviction. The retrial and convictions on the seven counts listed in the original indictment was unquestionably proper, and the district court ordered petitioner's sentence on the additional counts to run concurrently with these valid convictions. See *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16. See also *United States* v. *Poll*, 538 F. 2d 845, 847 (C.A. 9), certiorari denied, No. 76-249, November 29, 1976.[11] Moreover, petitioner suffered no collateral consequences from the additional counts: all of the evidence adduced at petitioner's second trial would have been admissible even if the retrial had been limited solely to the charges in the first indictment; the second trial, even with the increased number of counts, was shorter than the first;[12] and the jury's verdict—finding petitioner guilty on all counts—plainly was not the result of a compromise.

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[11] The sentence petitioner received also was substantially less than the court could have imposed if he had been convicted on all counts at the first trial. Petitioner would at most be entitled to a reversal of his conviction on Count forty-six, for which he received a sentence of two years' unsupervised probation.

[12] The first trial produced 2072 transcript pages from opening statement to verdict; the second, 1902 pages.

2. Petitioner contends (Pet. 18-24) that the false statement and concealment counts of the indictment failed to charge an offense under 18 U.S.C. 1001 because the fraudulent claims were not presented "in any matter within the jurisdiction of any department or agency of the United States * * *." It is settled, however, that if a false claim is presented to a non-federal agency that administers federal funds and the claim is paid with federal monies, the claim is deemed to have been made in a matter within the jurisdiction of the federal funding agency if the evidence establishes that the claimant was aware of these facts. *United States* v. *Lange*, 528 F. 2d 1280, 1287, n. 11 (C.A. 5); *United States* v. *Candella*, 487 F. 2d 1223, 1225-1227 (C.A. 2), certiorari denied, 415 U.S. 977; *United States* v. *Kraude*, 467 F. 2d 37, 38 (C.A. 9), certiorari denied, 409 U.S. 1076. Cf. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 543-544.[13]

As petitioner concedes (Pet. 19), each of the law enforcement groups listed in the false statement counts was funded either in whole or in part by L.E.A.A., which audits the books and records of its grantees (A. 254) and regulates the manner in which its grants are spent (A. 254-255). Moreover, it was also undisputed that petitioner's false claims were actually paid with L.E.A.A. funds. The evidence was clearly sufficient to establish that, on each occasion, petitioner was aware that his claim would be paid from the organization's federal grant (see, *e.g.*, A. 117, 118, 133, 138, 260-261,

[13]The false statement counts of the superseding indictment had been drafted to cure the defect found by the district court in its order dismissing Count Seven of the original indictment (S.A. 13). The count that was dismissed had alleged only that the organization to which petitioner's false claims had been presented was funded by L.E.A.A., rather than that petitioner's false claims had been paid with federal funds.

529-537; S.A. 26, 48, 51, 59-63; G.X. 3A), and the jury was expressly instructed that it had to find that petitioner knew or should have known of such federal funding before it could return a verdict of guilty (A. 1836).[14]

Moreover, there is no conflict among the courts of appeals on this issue. The two cases on which petitioner relies—*Lowe* v. *United States*, 141 F. 2d 1005 (C.A. 5), and *Terry* v. *United States*, 131 F. 2d 40 (C.A. 8)—have each been modified by subsequent cases in the circuit to reflect the principle that a false statement "need not have been submitted directly to a government agency for § 1001 to apply," so long as the false claimant has been "informed of the federal government's connection with the funding." *United States* v. *Lange, supra*, 528 F. 2d at 1287, n. 11. See also *Ebeling* v. *United States*, 248 F. 2d 429, 434 (C.A. 8), certiorari denied *sub nom. Emerling* v. *United States*, 355 U.S. 907.

Finally, petitioner's contention that "since 42 U.S.C. §3792 contains the provisions for crimes involving LEAA funds, Section 1001 has been pre-empted" (Pet. 23) was not raised below and has repeatedly been rejected in similar contexts. See, *e.g.*, *United States* v. *Gilliland*, 312 U.S. 86, 95-96; *United States* v. *Chakmakis*, 449 F. 2d 315, 316 (C.A. 5); *United States* v. *Burnett*, 505 F. 2d 815, 816 (C.A. 9), certiorari denied *sub nom. Lyon* v. *United States*, 420 U.S. 966. In any event, Section 3792 specifically incorporates 18 U.S.C. 1001.

[14]Although petitioner suggests (Pet. 23-24) that this case is distinguishable from *United States* v. *Candella, supra*, because there "the affidavits involved specifically contained advice to the signers which pointedly made them aware of the nature and purpose of the affidavit and also advised them that false statement[s] would be violative of the U.S. Code," these facts were relevant only to proof of the defendant's awareness that the non-federal agency was administering federal funds. Nothing in the court's opinion suggested that that element could not be proven by other types of evidence, such as the kind presented here. See pp. 6-7, 12, *supra*.

3. Petitioner contends (Pet. 24-28) that his conviction on multiple counts of mail fraud must be reversed because it is not "a criminal act to claim reimbursement of the same expenses which are actually incurred from two entities each of which independently is obligated to reimburse travel expenses" (Pet. 24).

The short answer to this argument is that it is premised on an erroneous view of the record. None of the organizations to which petitioner submitted false claims was "independently obligated" to reimburse him for expenses for which he had already been compensated. To the contrary, each of the organizations had well-established written or unwritten rules that would have barred payments resulting in double reimbursement (A. 138, 260-261, 365, 459-460, 537). Indeed, the National District Attorneys Association, of which petitioner was President and which received claims listed in 18 of the 35 mail fraud counts, had an express by-law precluding payment in such circumstances (A. 135-137).[15]

Nor is there merit to petitioner's related contentions that the district court placed upon him "the burden of disproving * * * criminality" and suggested that an act "may be criminal even though it violates no statute" (Pet. 27). The evidence clearly showed that petitioner was not entitled to be paid on the claims he submitted. In view of the court's statement that petitioner was charged with the use of the mails in furtherance of a scheme to defraud, which "embraces the general idea of a dishonest plan or scheme, the plan or scheme to obtain something to which one is not entitled by deluding another person

[15]The claims that form the basis for Count Forty expressly certified that "funds are not available * * * from any other source" to pay the incurred expense. This representation was plainly false and fraudulent even under petitioner's theory.

to turn it over to the planner" (A. 1851), and its repeated instructions that the government was required to prove beyond a reasonable doubt that petitioner "believed that the [National District Attorneys Association] or the other agencies might not have allowed the claim for reimbursement if it had known that the second claim for reimbursement for the same expenses [was] being presented to the County at the same time" (A. 1854; see also A. 1864, 1890-1891), the jury could have found petitioner guilty only if it concluded that he acted with fraudulent intent.[16]

4. Petitioner's final claim (Pet. 28-30) is that the district court abused its discretion in admitting evidence of prior similar acts. However, such proof is admissible if relevant to "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). Here, the central issue at trial was petitioner's state of mind (A. 977). The challenged evidence involved instances in which petitioner had billed Nassau County for travel and other expenses that had been provided to him free of charge by hotels or travel agents. The evidence thus clearly tended to establish "a consistent pattern of conduct highly relevant to the issue of intent." *Nye & Nissen* v. *United States*, 336 U.S. 613, 618. In addition, proof that petitioner had importuned a travel agent to lie about one of these incidents in order to thwart the investigation was admissible to show guilty knowledge.

Whether the probative value of particular evidence outweighs its prejudicial effect is a question addressed primarily to the sound discretion of the trial judge, who

[16]Petitioner's attack on the sufficiency of the indictment (Pet. 26) is equally insubstantial. The indictment not only tracks the language of Section 1341 and specifically alleges that petitioner "did devise and intend to devise a scheme to obtain money * * * by * * * false and fraudulent pretense[s]" (A. 33a-34a), but it also sets forth in detail the essence of the scheme.

"has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain." *United States* v. *Leonard*, 524 F. 2d 1076, 1092 (C.A. 2), certiorari denied, 425 U.S. 958. The court of appeals' affirmance of the district court's discretionary decision to admit the evidence in this case is correct and does not warrant further review.[17]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[17]Petitioner also alleges (Pet. 30) that the district court erred in reminding the jury that he was an interested witness and that he may "perhaps" have had more of a motive to lie than other witnesses in the case (A. 1873). This charge, however, was proper (see *United States* v. *Tyers*, 487 F. 2d 828, 831 (C.A. 2), certiorari denied, 416 U.S. 971; *United States* v. *Jansen*, 475 F. 2d 312, 319 (C.A. 7), certiorari denied, 414 U.S. 826), and petitioner did not object to it.